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In the Supreme Court of the United States

October Term, 1980

CURTIS JACKSON,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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QUESTIONS PRESENTED

Did the Court below err in affirming a criminal conviction based upon no evidence of guilt, therefore violating petitioner's due process rights?

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STATE OF MISSISSIPPI,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Petitioner, Curtis Jackson, respectfully prays that a Writ of Certiorari issue to review the judgment herein of the Supreme Court of the State of Mississippi entered on December 3, 1980; Petition For Rehearing denied on January 14, 1981.

OPINION BELOW

The opinion of the Court below was not designated for publication.

JURISDICTION

The judgment of the Mississippi Supreme Court was made and entered on December 3, 1980; Petition For Rehearing denied January 14, 1981, and is appended hereto. The jurisdiction of this Court is invoked under 28 United States Code, §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The due process and equal protection clauses of the Fourteenth Amendment, United States Constitution, which provide as follows:

> * * * [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The statutes under which petitioner was prosecuted were MISS. CODE ANN. §97-17-23 (1972),

> Every person who shall be convicted of breaking and entering, in the night, the dwelling house of another, armed with a deadly weapon, in which there shall be at the time some human being, with intent to commit some crime therein, shall be punished by imprisonment in the penitentiary not more than twenty-five years.

and MISS. CODE ANN. §97-35-15 (1972), which provides as follows:

> (1) Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to in-

timidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment in the county jail not more than six (6) months, or both.

(2) The provisions of this section are supplementary to the provisions of any other statute of this state.

STATEMENT OF THE CASE

The grand jury for the First Judicial District of Hinds County, Mississippi, returned an indictment against the petitioner, Curtis Jackson, on July 10, 1979. The indictment charged the petitioner with burglary of an inhabited dwelling, in the night while armed with a deadly weapon under MISS. CODE ANN. §97-17-23 (1972). The original indictment charged as follows:

> That Curtis Jackson, while then and there armed with a deadly weapon in said District, County and State on the 20th day of May, 1978 did then and there, unlawfully, wilfully, feloniously and burglariously, break and enter, in the night, the dwelling of Susan Russell, she being then and there in said dwelling house, with then and there the felonious intent of him, the said Curtis Jackson, to then and there unlawfully, wilfully and feloniously rape the said Susan Russell, but was intercepted and failed therein, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Miss.

Said indictment was amended by order of trial court as follows:

> That Curtis Jackson, while then and there armed with a deadly weapon in said District, County and State on the 20th day of May, 1978 did then and there, unlawfully, wilfully, feloniously and burglariously, break and enter, in the night, the dwelling of Susan Russell, she being then and there in said dwelling house, with then and there the felonious intent of him, the said Curtis Jackson, to then and there unlawfully, wilfully and feloniously commit a crime therein, to-wit: to disturb the peace of Susan Russell by insulting, indecent, offensive conduct, in violation of Section 97-35-15, Mississippi Code, 1972 contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Miss.

At the trial, the prosecution failed to show that the petitioner was armed with a deadly weapon and that he broke in with the intent to disturb the peace.

The jury returned a verdict of guilty and the petitioner was sentenced to a term of twenty-five years imprisonment in the Mississippi Department of Corrections, twenty years to serve and five years suspended on supervised probation. The petitioner appealed his conviction to the Mississippi Supreme Court which affirmed the judgment of the circuit court below.

REASONS FOR GRANTING THE WRIT

Fundamental to our system of justice is the principle that in order to convict of crime, the state must establish, by the evidence, all the elements of the offense charged; else there can be no valid conviction. Any such conviction of crime, without evidentiary support, violates the due process clause of the Fourteenth Amendment. *Thompson v. Louisville,* 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624, 80 A.L.R.2d 1355 (1960). The petitioner herein maintains that his conviction under MISS. CODE ANN. §97-17-23 (1972) was devoid of this evidentiary support and thus unconstitutional.

The State of Mississippi has several different statutes on burglary. One of the more demanding in terms of elements of proof and penalty is MISS. CODE ANN. §97-17-23 (1972). In order to constitute a violation under that section, six elements must be present: 1) breaking and entering, 2) in the night, 3) the dwelling house of another, 4) armed with a deadly weapon, 5) in which there shall be at the time some human being, 6) with intent to commit some crime therein. The penalty for violation of that section is imprisonment in the penitentiary for not more than twenty-five years.

The prosecution, in the trial below, failed to provide evidentiary support for two of the necessary elements. The statute requires that the person be armed with a deadly weapon. Nowhere in the record was there any evidence that the pistol found on the floor of the witness's living room was brought in by nor owned by the petitioner. The arresting officers made no attempt to preserve any fingerprints that might have been present on the pistol. The complaining witness testified that the pistol wasn't hers. Yet she also testified that there were sev-

eral other people in the house that night. There was no evidence connecting the petitioner with the weapon nor was he discovered in proximity to it.

The case of *Vachon v. New Hampshire,* 414 U.S. 478, 38 L.Ed.2d 666, 94 S.Ct. 664 (1974), presented a similar situation. There the defendant was convicted of violating a state statute making it an offense to wilfully contribute to the delinquency of a minor. The minor had purchased a questionable button in the defendant's store but there was no evidence at the trial that the defendant personally sold, or caused to be sold, the button to the minor. This Court reversed the conviction on the grounds that it violated due process in that there was no supporting evidence. Further, this Court said:

> This fatal void in the State's case was not filled by appellant's concession at trial that he "controlled the premises on July 26". That concession was evidence at most that he operated the shop; it was in no way probative of the crucial element of the crime that he personally sold the minor the button or personally caused it to be sold to her.

Id., at 480, 38 L.Ed.2d at 669, 94 S.Ct. at 665.

The petitioner maintains that the crucial element of the crime with which he is charged is the "armed with a deadly weapon" element of MISS. CODE ANN. §97-17-23 (1972). The state presented no evidence that the petitioner entered the house armed with a deadly weapon and, like *Vachon,* the fact that the complaining witness testified the pistol wasn't hers was in no way probative of this crucial element of the crime. Her testimony was, at most, worth its face value - that the gun wasn't hers. She did not know whose it was nor how it got there.

The prosecution also failed to offer any evidence that the petitioner had gained entry with the intent to commit

any crime while inside the dwelling. The petitioner was initially charged by indictment with the intent to commit rape while inside. However, once the prosecution realized that such a charge was absolutely ludicrous, they were allowed to amend the indictment to strike rape and substitute the misdemeanor charge of disturbing the peace under MISS. CODE ANN. §97-35-15 (1972).

The evidence clearly showed that the petitioner was found sleeping soundly in a bed a scant few steps away from the window through which he had entered. There was no evidence of any loud, offensive conduct or language, no intimidation, nor evidence of any *conduct* at all. The petitioner did not awaken until the police arrived. There was no proof of petitioner's intent to disturb the peace.

The Mississippi standard for determining intent is found in the case of *Newburn v. State,* 205 So.2d 260 (Miss. 1967), wherein the Mississippi Supreme Court said:

> Intent is an emotional operation of the mind, and is usually shown by acts and declarations of the defendant coupled with facts and circumstances surrounding him at the time. Defendant's intention is manifested largely by the things he does. It has been said that: Intent is a state of mind existing at the time a person commits an offense . . . The mind of an alleged offender, however, may be read from his acts, conduct, and inferences fairly deducible from all the circumstances.

Id., at 265.

The prosecution failed to show the petitioner did any act other than sleep through the entire episode. Upon awakening, the petitioner appeared confused, asking "where am I", and stating that he did not know that he was in

the wrong house. His intent, as demonstrated by his acts and declarations was to go to sleep that night; not breach the peace.

The petitioner's conviction, through use of the catch-all provisions of the state's breach of the peace statute, can be compared to the famous lunch counter cases. *Garner v. Louisiana,* 368 U.S. 157, 7 L.Ed.2d 207, 82 S.Ct. 248 (1961); *Barr v. Columbia,* 376 U.S. 146, 12 L.Ed.2d 766, 84 S.Ct. 1734 (1964). In those cases, blacks peacefully conducted sit-in demonstrations at lunch counters which served whites only. Their conduct amounted to quietly remaining seated at the counters. There was no loud, boisterous conduct involved. The respective states charged the defendants under their breach of the peace statutes. In both cases, this Court reversed the convictions for lack of evidentiary support as an unconstitutional violation of the defendants' due process rights.

The petitioner's conduct herein did not rise to that conduct contemplated in MISS. CODE ANN. §97-35-15 (1972), just as the defendants' conduct in *Garner* and *Barr* did not amount to a violation of their respective state statutes on breach of the peace. Nor was there any evidence of any intent on the part of the petitioner to commit such a breach of the peace. On the contrary, the record shows only the peaceful, quiet behavior of a sleeping man.

The State of Mississippi, in its zeal to convict the petitioner under the twenty-five year burglary statute, has quite simply not proven its case. Even with the amended indictment, the facts could not be stretched enough to provide adequate evidentiary support. The petitioner does not deny he broke into and entered the house but it was under the mistaken impression that it was his own, as evidenced by his remarks to the arresting officers. The petitioner denies and the evidence does not support the

state's charge that he was armed with a deadly weapon and intended to commit a breach of the peace while inside. Given the lack of evidentiary support, petitioner's conviction violates his constitutional right to due process.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ Of Certiorari be granted to review the judgment of the Supreme Court of the State of Mississippi.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 52,223

CURTIS JACKSON

v.

STATE OF MISSISSIPPI

NOT DESIGNATED FOR PUBLICATION

COURT FROM WHICH APPEALED:

CIRCUIT, HINDS COUNTY (1ST.DIST.)

PRESIDING JUDGE:

HON. WILLIAM F. COLEMAN

ATTORNEYS:

FOR APPELLANT:

HON. LEE B. AGNEW

FOR APPELLEE:

HON. CATHERINE WALKER UNDERWOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

CHARGE AND SENTENCE:

BURGLARY - 25 YEARS, 5 YEARS
SUSPENDED

DISPOSITION:

AFFIRMED

BEFORE SMITH, SUGG AND LEE
SUGG, JUSTICE, FOR THE COURT:

On Friday, May 19, 1978, Susan Russell, along with some friends attended a musical concert and returned to

her house about 11:30 p.m. The friends visited until about 12:30 a.m. and left. After locking all the doors, checking the bedrooms, and back rooms to see if everyone was gone, she went to bed. She was awakened by her alarm clock at a quarter of eight the next morning, put the tea kettle on, put on her bath robe and went out to get the paper. When she came back she saw a black lump in the middle of the living room and upon examination discovered that it was a pistol. She did not own a pistol and had never seen this pistol. Hearing a noise in the front bedroom, she went to the door and saw a man sound asleep in the bed wrapped up in the bedspread. The window was open, the screen in the sun porch was torn, and there was a ladder outside the window. Miss Russell then ran across the street to a neighbor's house and called the police. When the police came the man was still asleep and she followed the police in the house. One of the police pulled the spread off the man while Miss Russell was standing in the hall. She gave them a towel to wrap the man in.

Officer James French was one of the police who responded to the call and testified that he arrived at the house about 8:00 o'clock. He retrieved the pistol from the living room floor and he and another officer went to the bedroom and awakened the man. He found a step ladder leaning against the east side of the house by a window and stated a screen had been pulled from the window and was lying on the ground. Other officers found defendant's car with his clothes in the car around the corner approximately one hundred yards away from the house. They found no items of defendant's clothing in the house. When arrested the defendant had on a black, sleeveless, silk-looking shirt.

In his first assignment of error defendant argues he was entitled to a peremptory instruction. Defendant was

indicted under section 97-17-23 Mississippi Code Annotated (1972) which follows:

> Every person who shall be convicted of breaking and entering, in the night, the dwelling house of another, armed with a deadly weapon, in which there shall be at the time some human being, with intent to commit some crime therein, shall be punished by imprisonment in the pentientiary not more than twenty-five years.

Defendant argues that the only thing proven by the state was that defendant was found in a bedroom in the home of Susan Russell; that defendant was asleep in a bed in the room unoccupied by anyone with the bedspread covering his body; that no one knew the time he entered the residence and no other crimes were attempted or committed by Curtis Jackson.

The amended indictment charged:

> That Curtis Jackson, while then and there armed with a deadly weapon in said district, county and state on the 20th day of May, A.D., 1978 did then and there, unlawfully, willfully, feloniously and burglariously, break and enter, in the night the dwelling of Susan Russell, she being then and there in said dwelling house, with then and there the felonious intent of him, the said Curtis Jackson, to then and there unlawfully, willfully, and feloniously commit a crime therein, to-wit: To disturb the peace of Susan Russell by insulting, indecent, offensive conduct, in violation of section 97-35-15, Mississippi Code, 1972.

Section 97-35-15 Mississippi Code Annotated (1972) provides the following:

(1) Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to intimidate any other persor or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment in the county jail not more than six (6) months, or both.

(2) The provisions of this section are supplementary to the provisions of any other statute of this state.

We are of the opinion that the proof was ample to sustain the conviction and the evidence showed that defendant disturbed the peace of Susan Russell by taking a screen off the window, breaking into her house, leaving a pistol on the living room floor, and going to bed in a semi-nude condition. Defendant's actions on the night in question were certainly calculated to disturb the peace of Susan Russell.

In his second assignment of error defendant complains that the following instruction given the state was erroneous:

The Court instructs the Jury that if you believe from the evidence in this case beyond a reasonable doubt that the Defendant, Curtis Jackson, while armed with a deadly weapon, on or about May 20, 1978, did unlawfully, wilfully, feloniously and burglariously break and enter in the nighttime, the dwelling house of Susan Russell, at a time when Susan Russell was

inside said dwelling, with the intent to then and there unlawfully, wilfully and feloniously commit a crime therein, to-wit: to disturb the peace of Susan Russell by insulting, indecent, or offensive conduct, then it will be your sworn duty to find the Defendant guilty of burglary with a deadly weapon in the night.

Should you find the Defendant guilty then the form of your verdict may be:

"We, the Jury, find the Defendant guilty of burglary with a deadly weapon at night."

Your verdict should be written on a separate sheet of paper.

Defendant argues the instruction should not have been given because violation of section 95-35-15 amounts to a misdemeanor and the indictment charged defendant with an intent to *feloniously* commit a *misdemeanor*. He reasons this is impossible and the state did not prove on the trial that he feloniously attempted to commit a misdemeanor. The argument on this assignment of error is directed toward the insufficiency of the indictment rather than the instruction. No demurrer was filed challenging the sufficiency of the indictment. We find no error in the instruction which would require reversal.

AFFIRMED.

PATTERSON, C.J., SMITH, P.J., ROBERTSON, P.J., AND WALKER, BROOM, LEE, BOWLING AND COFER, JJ., CONCUR.

STATE OF MISSISSIPPI
HINDS COUNTY

I, Robert E. Womack, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the opinion delivered by the Court in the cause therein stated, as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Miss., this the 28th day of January A.D., 1981.

/s/ Robert E. Womack
Clerk Supreme Court

(Seal)

APPENDIX B

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MINUTES, SUPREME COURT OF MISSISSIPPI

SEPTEMBER TERM, 1980

WEDNESDAY, JANUARY 14, 1981, COURT SETTING : : :

CURTIS JACKSON

#52,233 v

STATE OF MISSISSIPPI

This cause this day came on to be heard on Petition for Rehearing and this Court having sufficiently examined and considered the same en banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.

ATTEST

A True Copy

This the 28th day of Jan. 1981.

Robert E. Womack, Clerk
Supreme Court of Mississippi
By /s/ Debbie Holmes

(Seal)